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U.S. ATTORNEY SDNY

JUDGE RAKOFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK 05 CV 3941

ASSOCIATED PRESS,		**Index No.___________**
Plaintiff,		
- against -		**ECF CASE**
		COMPLAINT
UNITED STATES DEPARTMENT OF DEFENSE,		
Defendant.		

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U.S.D.C. S.D. N.Y.
CASHIERS

Plaintiff, The Associated Press ("AP"), by its undersigned attorneys, alleges:

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, brought by the nation's largest newsgathering organization to compel access to testimony, written statements, and other documents provided by detainees held at the U.S. Naval Base, Guantanamo Bay, Cuba to the United States Government's Combatant Status Review Tribunals. Obtaining copies of these documents is a matter of urgent concern to the AP in connection with its continuing reporting on major constitutional and foreign policy issues presented by the government's handling of these detainees.

Associated Press v. United States Department of Defense Doc. 13 Att. 1

2. The United States has detained hundreds of people at a Naval base in Guantanamo Bay, Cuba since January 2002. Taking the position that they are "enemy combatants" not entitled to the full panoply of American legal rights, the executive branch has detained these people indefinitely over the years without charge, trial or other judicial process, without access to legal counsel, and without applying the Geneva Conventions.

3. In the wake of two adverse decisions by the United States Supreme Court in July 2004, the Department of Defense established a forum in which the detainees could contest their status as "enemy combatants" – Combatant Status Review Tribunals ("CSRTs"). Over a period of six months, five hundred fifty-eight (558) CSRTs convened and thirty-eight (38) detainees were declared to be "non-enemy combatants."

4. In the Fall of 2004, AP made a FOIA request to the Department of Defense ("DOD") seeking copies of information provided by the detainees in connection with their CSRT proceedings, including their testimony, written statements, and documents they provided to their DOD-assigned "personal representatives." AP requested that DOD expedite its processing of the request given the timely news value and importance of the information sought.

5. In response to AP's FOIA request, DOD agreed to expedite the request. Notwithstanding this purported "expedited processing," for *over five months* defendants have failed to provide the documents to AP, and still have not processed AP's timely administrative appeal of the failure to disclose them. Given the significant public interest in understanding and resolving the questions concerning the propriety of the detentions of hundreds at Guantanamo Bay, AP seeks declaratory, injunctive and other relief to enforce its statutory right to inspect the detainees' testimony, statements, and documents submitted in support of their assertions of innocence. AP seeks expeditious treatment of this Complaint pursuant to 28 U.S.C. § 1657.

THE PARTIES

6. Plaintiff AP is a not-for-profit membership corporation organized under the laws of the State of New York, with its headquarters located at 450 West 33rd

Street, New York, New York. AP provides news to more than 15,000 news outlets every day Its members and subscribers include this nation's newspapers, magazines, broadcasters, cable news services and Internet content providers.

7. Defendant Department of Defense is a department within the executive branch of the United States government. Defendant is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action and personal jurisdiction over the defendant pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-06.

9. Venue is premised on plaintiff's place of business and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

FACTS

The Guantanamo Bay Detention Controversy Underlying AP's FOIA request

10. The United States Government's detention of hundreds of persons at Guantanamo Bay has generated widespread controversy since early 2002. Reports of complaints ranging from constitutional violations of United States citizens' rights, to violations of international law, to claims of inhumane and cruel treatment have been published major news outlets throughout this country.

11. In late June 2004, the United States Supreme Court issued decisions in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In

these cases, the Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker," *Hamdi*, 124 S. Ct. at 2634, and that the United States courts have jurisdiction to hear challenges to the legality of detention of foreign nationals held at Guantanamo Bay as well, *Rasul*, 124 S. Ct. at 2698.

12. On July 7, 2004, in response to these decisions, the Department of Defense announced the formation of the "Combatant Status Review Tribunal" as a "forum for detainees to contest their status as enemy combatants." News Release No. 651-04, U.S. Dep't of Defense, July 7, 2004. (A true and correct copy of this news release is annexed as Exhibit A.) These tribunals operate without many of the procedural protections known to American law. *See generally In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

13. From August 2004 through January 2005, five hundred fifty-eight tribunals (558) convened, thirty-eight (38) of which declared the detainees examined at those tribunals to be "non-enemy combatants." *See* Combatant Status Review Tribunal Summary as of March 29, 2005. (A true and correct copy of this Government summary is annexed as Exhibit B.)

14. On January 31, 2005, the United States District Court for the District of Columbia held that eleven (11) detainees had stated claims that the procedures employed in the CSRTs were insufficient, resulting in the deprivation of their due process rights, and that the Geneva Conventions should properly have been applied to some of the plaintiff detainees. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005).

15. To date, given the lack of documentation provided by the Government, AP has been able to report only anecdotally on these proceedings that are unquestionably of great interest to the public.

AP's Efforts to Obtain Detainees' Testimony,
Statements, and Other Supporting Documents

16. On November 4, 2004, AP submitted a narrow, specific and particularized FOIA request to DOD seeking:

- "Transcripts of all testimony given to any [CSRT] by any detainee [at Guantanamo] since July 30, 2004";
- "Copies of all written statements provided to any CSRT by any detainee . . . since July 30, 2004"; and
- "Copies of all documents that have been provided by any detainee . . . to their assigned 'personal representatives,' including any documents stating the basis for a detainee's refusal to attend a CSRT."

(A true and correct copy of this request is annexed as Exhibit C.)

17. AP submitted its request by facsimile and stressed that the transcripts and other documents were "of timely news value" and were sought "in connection with its reporting on a continuing news story of great interest to the public." Pursuant to 5 U.S.C. § 552(a)(6)(E), AP requested expedited treatment of its FOIA request. Given the time-sensitive nature of the request, AP also asked DOD to communicate any questions concerning the request "by telephone, fax or email, rather than relying upon regular mail," and contact AP when the requested documents were ready for release so that they could be obtained quickly by courier.

18. By letter dated November 8, 2004, defendant DOD informed AP that it had "granted" AP's request for expedited processing. In the same letter, however, DOD

attempted to disclaim any actual obligation to expedite the request: "[P]lease be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties." The letter did not enclose any responsive documents or indicate when responsive documents might be expected. (A true and correct copy of defendant's response to AP's request for expedition is annexed as Exhibit D.)

19. This response by DOD was improper under the statutory mandate for handling expedited requests, and effectively defeated AP's rights under the FOIA. AP immediately objected by telephone to Mary Wahling, the DOD officer assigned as AP's "point of contact" for its request, urging expedited processing and release of the requested materials. Based on the telephone call, AP also submitted in writing an amendment to its November 4, 2004 request, to make clear that it sought not only the DOD's English translations of the testimony and documents requested, but also copies of testimony and documents in their original non-English form. (A true and correct copy of AP's amended request dated November 18, 2004 is annexed as Exhibit E.)

20. Despite numerous inquiries to DOD over the ensuing weeks regarding the status of AP's request, and many efforts to urge the process along, DOD failed either to produce *any* records to AP or to claim any exemption for withholding the requested records. It simply declined to respond. Accordingly, on February 10, 2005, AP submitted to DOD, by fax and Federal Express, its appeal of the constructive denial of AP's request. AP expressly requested expedited treatment of the appeal, explaining again its need for the information sought in connection with a continuing news story of great public interest. (A true and correct copy of AP's administrative appeal is annexed as Exhibit F.)

21. By letter dated February 22, 2005, DOD responded to AP's administrative appeal as follows:

> We granted the AP expedited processing in our November 8, 2004 response . . . . That determination is still valid. However, as a result of your appeal for a constructive denial because no records have been processed, your firm's request of November 4, 2004 will be processed within FOIA appeals channels.

(A true and correct copy of this letter is annexed as Exhibit G.)

22. On March 4, 2005, the "action officer" for AP's administrative appeal, David Maier, informed AP's counsel by telephone that responsive documents would finally be produced to AP in "waves," beginning by "the first week of April."

23. AP received no documents or further communication from DOD, in early April. AP contacted Mr. Maier to object. On April 15, Mr. Maier informed AP that DOD had indeed located and copied the documents responsive to AP's request, but that it would not even begin the process of reviewing and redacting those documents until Wednesday, April 20. Mr. Maier again stated that the documents would be produced "in waves" but he declined to provide even an approximate date by which AP might expect to receive the first such wave.

24. More than twenty days have passed since AP submitted its February 10, 2005 administrative appeal to DOD.

25. AP has exhausted its administrative remedies.

FIRST CAUSE OF ACTION
(Violation of FOIA for constructively failing to expedite AP's request)

26. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

27. Defendant's failure to expedite the processing of AP's request and AP's appeal (despite its repeated statements purporting to "grant" AP's request to expedite) violates FOIA, 5 U.S.C. § 552(a)(6)(E), and defendant's own regulations promulgated thereunder.

SECOND CAUSE OF ACTION
(Violation of FOIA for failure to make records available)

28. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

29. Defendant's failure to make promptly available and to release the documents requested by AP violates FOIA, 5 U.S.C. § 552(a)(3)(A).

RELIEF REQUESTED

WHEREFORE, AP respectfully prays that this Court:

a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;

b. Declare that the transcripts of all Guantanamo detainees' testimony before the CRSTs, the written statements they submitted to the CRSTs, and the documents they submitted to their personal representatives must be disclosed by defendant in their entirety (both in their English and non-English forms where applicable);

c. Enjoin defendant immediately and expeditiously to provide to AP copies of the requested documents related to the Guantanamo detainees;

d. Award AP the costs of this proceeding, including reasonable attorneys' fees and costs; and

e. Grant such other and further relief as the Court deems just and proper.

Dated: April 19, 2005
New York, NY

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: ____________________

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A

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United States Department of Defense

News Release

IMMEDIATE RELEASE

No. 651-04
July 7, 2004

COMBATANT STATUS REVIEW TRIBUNAL ORDER ISSUED

GlobalSecurity.org
In-Depth Coverage

The Department of Defense announced today the formation of the Combatant Status Review Tribunal for detainees held at Guantanamo Bay, Cuba. This tribunal will serve as a forum for detainees to contest their status as enemy combatants.

Detainees held at Guantanamo Bay will be notified within 10 days of their opportunity to contest their enemy combatant status under this process. The tribunal process will start as soon as possible. Detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States. Habeas corpus is a writ ordering a person in custody to be brought before a court.

An individual tribunal will be comprised of three neutral officers, none of whom were involved with the detainee. One of the tribunal members will be a judge advocate and the senior ranking officer will serve as the president of the tribunal.

Each detainee will be assigned a military officer as a personal representative. That officer will assist the detainee in preparing for a tribunal hearing. Detainees will have the right to testify before the tribunal, call witnesses and introduce any other evidence. Following the hearing of testimony and other evidence, the tribunal will determine in a closed-door session whether the detainee is properly held as an enemy combatant. Any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

This tribunal does not replace the administrative review procedure announced earlier this year.

The order establishing the tribunals and a DoD Fact Sheet are available at: d20040707review.pdf d20040707factsheet.pdf http://www.defenselink.mil/releases/2004/nr20040707-0992.html

Combatant Status Review Tribunals

In response to last week's decisions by the Supreme Court, the Deputy Secretary of Defense today issued an order creating procedures for a Combatant Status Review Tribunal to provide detainees at Guantanamo Bay Naval Base with notice of the basis for their detention and review of their detention as enemy combatants. Each of these individuals has been determined to be an enemy combatant through multiple levels of review by the Department of Defense. The procedures for the Review Tribunal are intended to reflect the guidance the Supreme Court provided in its decisions last week.

The Supreme Court's Decisions

- The Supreme Court held that the federal courts have jurisdiction to hear challenges to the legality of the detention of enemy combatants held at Guantanamo Bay. In a separate decision – involving an American citizen held in the United States – the Court also held that due process would be satisfied by notice and an opportunity to be heard, and indicated that such process could properly be provided in the context of a hearing before a tribunal of military officers.
- The Court specifically cited certain existing military regulations, Army Regulation 190-8, which it suggested might be sufficient to meet the standards it articulated. The tribunals established under those regulations are relatively informal and occur without counsel or a personal representative. The process is a streamlined process designed to allow for expeditious determinations; in citing it, the Court recognized the military's need for flexibility and indicated that the process might provide all that was needed even for a citizen. Even in a traditional conflict, such a hearing is not provided to everyone who is detained, but only in cases of doubt as to the basis for detention.

The Process – The order issued today creates tribunals very much like those cited favorably by the Court to meet the unique circumstances of the Guantanamo detainees, and will provide an expeditious opportunity for non-citizen detainees to receive notice and an opportunity to be heard. It will not preclude them from seeking additional review in federal court.

- *Notice.* By July 17, each detainee will be notified of the review of his detention as an enemy combatant, of the opportunity to consult with a personal representative, and of the right to seek review in U.S. courts.
- *Personal Representative.* Each detainee will be assigned a military officer as a personal representative to assist in connection with the Tribunal process. This person is not a lawyer but provides assistance to the detainee that is not normally offered in the process cited favorably by the Supreme Court or required by the Geneva Conventions.
- *Tribunals.* Detainees will be afforded an opportunity to appear before and present evidence to a Tribunal composed of three neutral commissioned military officers, none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee.

- *Hearings.*
  - The detainee will be allowed to attend all proceedings of the Tribunal except for those involving deliberation and voting or which would compromise national security if held in the presence of the detainee.
  - The detainee will be provided with an interpreter and his personal representative will be available to assist at the hearing.
  - The detainee will be allowed to present evidence, to call witnesses if reasonably available, and to question witnesses called by the Tribunal.
  - The detainee will have the right to testify or otherwise address the Tribunal in oral or written form, but may not be compelled to testify.
- *Decision.* The Tribunal will decide whether a preponderance of evidence supports the detention of the individual as an enemy combatant, and there will be a rebuttable presumption in favor of the Government's evidence.
- *Non-Enemy Combatant Determination.* If the Tribunal determines that the detainee should no longer be classified as an enemy combatant, the Secretary of Defense will advise the Secretary of State, who will coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

B

COMBATANT STATUS REVIEW TRIBUNAL SUMMARY

Convening Authority Rear Adm. James M. McGarrah reviewed the records of 19 detainee tribunals over the period (21 - 29 March 2005). McGarrah approved the decisions of the tribunals, determining that 14 of the detainees are classified as enemy combatants and 5 detainess are no longer classified as enemy combatants.

A summary of the tribunal statistics to date is provided.

Date of Report	Number of Tribunals Held	Convening Authority Final Action	Outcome	
			Enemy Combatant	Non-enemy combatant
Aug. 13, 2004	21	4	4	0
Aug. 20, 2004	9	10	10	0
Aug. 30, 2004	12	5	5	0
Sep. 3, 2004	7	10	10	0
Sep. 8, 2004	6	1	0	1
Sep. 13, 2004	6	8	8	0
Sep. 20, 2004	8	5	5	0
Sep. 27, 2004	25	10	10	0
Oct. 4, 2004	29	16	16	0
Oct. 11, 2004	32	20	20	0
Oct. 18, 2004	28	7	7	0

INTERNET AVAILABILITY: This document is available on DefenseLINK, a World Wide Web Server on the Internet, at: http://www.defenselink.mil

Oct. 25, 2004	40	5	5	0
Nov. 1, 2004	39	3	3	0
Nov. 8, 2004	55	27	27	0
Nov. 15, 2004	45	0	0	0
Nov. 22, 2004	39	13	13	0
Nov. 29, 2004	27	17	17	0
Dec. 6, 2004	38	33	33	0
Dec. 13, 2004	23	13	13	0
Dec. 20, 2004	18	23	22	1
Jan. 3, 2005	25	2	2	0
Jan. 10, 2005	7	11	11	0
Jan. 19, 2005	11	87	86	1
Jan. 24, 2005	8	35	35	0
Feb. 3, 2005	0	28	25	3
Feb. 14, 2005	0	29	23	6
Feb. 24, 2005	0	36	30	6

Mar. 1, 2005	0	29	25	4
Mar. 14, 2005	0	32	24	8
Mar. 21, 2005	0	20	17	3
Mar. 29, 2005	0	19	14	5
Aggregate	558	558	520	38

C

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(212) 850-6113

November 4, 2004

BY FACSIMILE

Rear Admiral James McGarrah
2000 Navy Pentagon
Room 4D 445
Washington, DC 20350-2000

Information Officer
Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon
Room 2C757
Washington, DC 20301-1155

Re: Request for information under Federal Freedom of Information Act

Dear Sirs:

We represent The Associated Press ("AP"), and this is a request for information pursuant to the Freedom of Information Act (5 U.S.C. § 552). AP is seeking production of the following:

1. Transcripts of all testimony given to any Combatant Status Review Tribunal (CSRT) by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004;

2. Copies of all written statements provided to any CSRT by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004;

3. Copies of all documents that have been provided by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba to their assigned "personal representatives," including any documents stating the basis for a detainee's refusal to attend a CSRT.

AP is seeking these materials in connection with its reporting on a continuing news story of great interest to the public. We therefore ask that you expedite your response to

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

these requests as required by 5 U.S.C. §552(a)(6)(E). Because this information is of timely news value, if you have any questions about this request, please contact me by telephone, fax or email, rather than relying upon regular mail. You may reach me by telephone at (212) 850-6113, by fax at (212) 850-6299, or by email at hdelaine@lskslaw.com.

When you complete your work on this request, I would also appreciate it if you would contact me by phone so I can arrange for a courier to pick up the documents.

Thank you for your assistance with this request.

Very truly yours,

Halimah D. DeLaine

cc: Paisley Dodds

D

DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

08 NOV 2004

Ref: 05-F-0212

Ms. Halilmah D. DeLaine
Levine Sullivan Koch & Schulz, LLP
230 Park Avenue, Suite 1160
New York, NY 10169

Dear Ms. DeLaine:

This is in response to your November 4, 2004, Freedom of Information Act (FOIA) request to the Office for Freedom of Information and Security Review (OFOISR) and to Rear Admiral James McGarrah for information regarding the Combatant Status Review Tribunal (CSRT).

I have granted expedited processing for your request. It is being processed in accordance with procedural requirements established in Department of Defense (DoD) Regulation 5400.7-R available on the internet at http://www.defenselink.mil/pubs/foi. Expedited processing means that the offices processing your request, including this office, have placed it ahead of all other FOIA requests in the processing queue, except for those expedited requests that have arrived earlier than your request. However, please be aware that the DoD component tasked to search for and review documents responsive to your request is under no obligation to process your request at the expense of performing their normal day-to-day duties. In some instances, the performance of these duties may be primary to the processing of your FOIA request.

Our point of contact for this action is Mary Wahling, (703) 614-2411.

Sincerely,

C. Y. Talbott
Chief

E

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November 18, 2004

BY FACSIMILE

Ms. Mary Wahling
Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon
Room 2C757
Washington, DC 20301-1155

Re: **Amended request for information under Federal Freedom of Information Act**

Dear Ms. Wahling:

Please consider this letter an amendment to my November 4, 2004 request for information pursuant to the Freedom of Information Act (5 U.S.C. § 552). AP is seeking production of the following:

1. Transcripts of all testimony given to any Combatant Status Review Tribunal (CSRT) by an detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004. When testimony is taken in a language other than English, this request seeks both the English translation of the testimony and the transcription of testimony in its original non-English form.

2. Copies of all written statements provided to any CSRT by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004. When written statements are provided in a language other than English, this request seeks both the English translation of the statements and copies of the statements in their original non-English form.

3. Copies of all documents that have been provided by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba to their assigned "personal representatives," including any documents stating the basis for a detainee's refusal to attend a CSRT. When documents are provided in a language other than English, this request seeks

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both the English translation of the documents and copies of the document in their original non-English form.

AP is seeking these materials in connection with its reporting on a continuing news story of great interest to the public. We therefore ask that you expedite your response to these requests as required by 5 U.S.C. §552(a)(6)(E). Because this information is of timely news value, if you have any questions about this request, please contact me by telephone, fax or email, rather than relying upon regular mail. You may reach me by telephone at (212) 850-6113, by fax at (212) 850-6299, or by email at hdelaine@lskslaw.com.

When you complete your work on this request, I would also appreciate it if you would contact me by phone so I can arrange for a courier to pick up the documents.

Thank you for your assistance with this request.

Very truly yours,

Halimah D. DeLaine

cc: Paisley Dodds

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February 10, 2005

VIA FACSIMILE AND FEDERAL EXPRESS

Directorate for Freedom of Information
and Security Review
Room 2C757
1155 Defense Pentagon
Washington, DC 20301-1155
FAX: (703) 693-7341

Re: *Freedom of Information Act Appeal by The Associated Press*

Dear Sir/Madam:

We represent The Associated Press ("AP") and write to appeal the constructive denial of a Freedom of Information Act request we originally submitted to the Department of Defense in November of last year.

I. Background

By letters dated November 4, 2004 and November 18, 2004 (attached hereto as Exhibit A), AP requested: (1) Transcripts of all testimony given to any Combatant Status Review Tribunal (CSRT) by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba, since July 30, 2004 (including transcripts taken in non-English languages and their English translations), (2) Copies of all written statements provided to any CSRT by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba, since July 30, 2004 (including statements taken in non-English languages and their English translations), and (3) Copies of all documents (including documents in non-English languages and their English translations) that have been provided by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba, to their assigned "personal representatives," including any documents stating the basis for a detainee's refusal to attend at CSRT. AP requested expedited treatment of these requests pursuant to 5 U.S.C. § 552(a)(6)(E) because the documents sought pertained to its reporting on a continuing news story of great interest to the public.

By letter dated November 8, 2004, C.Y. Talbott, Chief of the Office of Freedom of Information and Security Review, responded to AP's request for expedition, noting "I have granted expedited processing for your request." (A copy of this letter is attached hereto as Exhibit B.)

My colleague Halimah Delaine spoke by phone several times to Mary Wahling, the Department of Defense ("DOD") FOIA officer handling these requests. On November 30, 2004, Ms. Wahling related that her office had received the first set of documents for review. On December 8, Ms. Delaine spoke again with Ms. Wahling, who first related that the first wave of documents was still being reviewed, but, in a later conversation that day, stated that DOD was actually still collecting responsive documents, and no review of those documents was yet scheduled. Three weeks later, on December 29, 2004, Ms. Wahling reported that DOD was still gathering documents and that the FOIA office had yet to begin any sort of review.

As of today's date, three months after the requests were made, no documents have been received, nor has the Department of Defense ("DOD") sent any correspondence advising of any reason for delay and/or requesting an extension.

II. Basis for Appeal

DOD regulations require prompt action on FOIA requests. *See* DoD Directive 5400.7, C1.5.4.1. Under the Freedom of Information Act, documents are to be produced within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(i); DoD Directive 5400.7 at C.5.2.5.1.

DOD may properly withhold the information sought by AP only if it demonstrates "by specific and detailed proof that disclosure would defeat, rather than further, the purpose of the FOIA." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (citation omitted). The basic policy of the Act is to compel disclosure, and claims of exemption must therefore be supported with "specificity and [in] detail." *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm. v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (alteration in original). To withhold information, DOD must provide both the factual support and "the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data Cent.*, 566 F.2d at 261.

DOD has not produced any documents, has not claimed any exemption to disclosure, , and has not sought an extension of time to respond to AP's request DOD's failure to produce the requested materials or further communicate with AP and its attorneys is improper. DOD's refusal to produce the requested documents is particularly improper given the time-sensitive nature of AP's request and the important news value of the documents sought (which DOD recognized in determining at the outset that the requests should be expedited). The Freedom of Information Act directs that expedited treatment should be provided when a request is "made by a person primarily engaged in disseminating information" and there is an "urgency to inform the public of actual or alleged Federal Government activity." 5 U.S.C.A. § 552(a)(6)(E)(v)(II). Clearly, the AP is a news organization "primarily engaged in disseminating information," and an "urgency to inform" exists because (1) the information relates to a currently unfolding story, (2) delaying release of the information harms the public interest, and (3) the request concerns federal governmental activity. *Al-Fayed v. CIA*, 245 F.3d 300 (D.C. Cir. 2001). Here, not only has DOD failed to provide expedited treatment, it has failed to comply with its ordinary obligations under FOIA to produce requested documents within 20 days.

Pursuant to DOD regulations, appeal procedures are available to FOIA requesters for "any *determination found to be adverse in nature by the requester.*" DoD Directive 5400.7, C5.3.1 (emphasis in original). The DOD's failure to produce the records or claim any exemption is adverse to AP, and as such, AP hereby appeals the DOD's "constructive denial" of the FOIA request. *See* DoD Directive 5400.7 C.5.3.1 (noting that "not providing a responsive determination to a FOIA request within the statutory time limits" is an adverse determination).

III. Request for Relief

For the foregoing reasons, we respectfully submit that DOD has constructively failed to meet its legal obligation to disclose the documents and information requested on November 4 and November 18, 2004.

Again we advise you that the information is sought in connection with reporting by AP on a continuing news story of great public interest. Therefore we respectfully request expedited treatment of this appeal. In any event, we trust that we will receive your decision within 20 business days as required by DOD Directive 5400.7, C.5.3.3.2 and 5 U.S.C § 552(a)(6)(A)(ii).

Thank you for your prompt attention to this matter.

Very truly yours,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By [signature]
Alia L. Smith

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DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

22 FEB 2005

Ref: 05-F-0212(A)

Ms. Alia L. Smith
Levine, Sullivan, Koch & Schulz, LLP
230 Park Avenue, Suite 1160
New York, NY 10169

Dear Ms. Smith:

This is in response to your February 10, 2005, Freedom of Information Act (FOIA) appeal on behalf of the Associated Press (AP).

We granted the AP expedited processing in our November 8, 2004 response to Ms. Halimah DeLaine, formerly of your firm. That determination is still valid. However, as a result of your appeal for a constructive denial because no records have been processed, your firm's request of November 4, 2004 will be processed within FOIA appeals channels.

The action officer for this appeal is David Maier, (703) 695-6428.

Sincerely,

C. Y. Talbott
Chief